

by Berry in April, 2005, purporting to contain the electronic copy of his FCS 1993 database.) It is my understanding that, for purposes of litigation, I should rely on the copyright registration. Thus, my analysis was based on that version. Apparently Berry and Johnson chose to use another version, thus the discrepancy in the number of fields. In any case, the precise number of fields in the database has no bearing on the substance of my analysis, and in fact, Berry does not dispute the vast majority of my findings. As a result, the following findings in my expert report are now undisputed:

Dual Databases (the databases used between April 1, 2003 and June 9, 2003):

- Berry did not dispute my opinion that six out of the seven fields added by Fleming to Original Logistics Data.mdb were, in fact, non-infringing. He only disputed that *one* field out of a total of 1334 fields (or 1356, to use Berry's number) was significant. It is undisputed that the two databases are more than 99.9% identical or otherwise non-infringing. Thus Berry's whole argument for infringement during this period rests on the use of one experimental field. As will be discussed in more detail below, Berry's speculation regarding the significance of this field is misplaced, but even assuming Berry's position that the field is significant, it represents a tiny fraction of the entire work.
- Berry did not dispute that Fleming's intent was to make the databases identical.
- Berry did not dispute that the other data base file "Auxiliary Logistics Data.mdb" was entirely authored by Fleming and is not a derived work.
- Berry did not dispute that Berry had admitted that Fleming continued to have a valid license to use his work after the jury verdict.

In summary, given that even Berry concedes that the databases are more than 99.9% identical or otherwise non-infringing and that Fleming intended to make them exactly identical, it is not reasonably disputable that the file "Original Logistics Data.mdb" should not be considered to be an unlicensed derived work.

2003 Excel Spreadsheets:

- Berry did not dispute that the extraction of Fleming's data did not, in and of itself,